(3)

Supreme Court, U.S.
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No. 04-851

In the Supreme Court of the United States

AQUAMAR S.A.,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257 to review the decision of the Florida District Court of Appeal because petitioner failed to seek review in the Supreme Court of Florida as "the highest court of [the state] in which a decision could be had" (*id.*).

2. Whether this petition should be held pending the Court's decision in *Bates v. Dow Agrosciences LLC*, No. 03-388 (U.S. argued Jan. 10, 2005), even though (a) petitioner waived any *Bates* issues below and (b) the cases present different FIFRA preemption questions.

3. Whether the court below, in a decision of first impression that does not conflict with any other decision, correctly held that FIFRA's express preemption provision applies to cases brought under state law in state court that involve fungicides exported from the United States for use in foreign countries.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company, and no publicly held company owns 10% or more of DuPont's stock. DuPont is a publicly traded corporation listed on the New York Stock Exchange.

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STATEMENT OF JURISDICTION

Petitioner seeks review of a decision of the Florida District Court of Appeal. It invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. However, because petitioner did not seek review in the Supreme Court of Florida as "the highest court of [the state] in which a decision could be had" (*id.*), this Court lacks jurisdiction over the petition. *See* pages 6-9, *infra.*

STATEMENT

1. Petitioner owns and operates a shrimp farm in Ecuador. In 1992, petitioner's shrimp began to die off in large numbers. Petitioner thought that this was attributable to the run-off into local waters of fungicides that neighboring banana farmers were using to combat a deadly fungus. Three fungicides were being used on a rotating basis: Tilt, manufactured by Ciba-Geigy; Calixin, manufactured by BASF; and Benlate, manufactured by respondent.

Initially, in 1992 petitioner and certain Ecuadorian scientists believed that the shrimp deaths were caused by a toxin in the water resulting from the use of Tilt and Calixin. None of these scientists blamed Benlate at that time.

Subsequently, other scientists concluded in 1994-1995 that the cause was a newly-discovered virus and that environmental factors played no role. In particular, they determined that Benlate was not responsible for the shrimp deaths.

As petitioner recognizes, the issue of causation was sharply contested at trial in this case and was the subject of "extensive and conflicting expert testimony." Pet. 4. [1]

2. Petitioner and its experts first focused on Tilt and Calixin as the cause of the shrimp deaths, and petitioner sued Ciba-Geigy and BASF as the manufacturers of those fungicides. Only after those suits were dismissed on the ground of forum non conveniens[2] did petitioner sue respondent. It asserted a cause of action under Florida tort law and alleged that Benlate was the cause of the shrimp deaths.

Petitioner had full discovery on its claim against respondent before the case proceeded to trial. In the trial court, petitioner made clear that it was not asserting the argument that respondent's Benlate had a design defect or was negligently designed. *See, e.g.*, R28: 10/4/00 Tr. at 75-79 (hearing on motion in limine).[3] Nor did it allege

1. Although the jury eventually found for petitioner on its claim of negligent distribution, respondent's appeal vigorously attacked the jury's verdict. Because the Florida District Court of Appeal accepted respondent's preemption theory and dismissed petitioner's claim on that basis, it did not reach the validity of the verdict. In these circumstances, the facts cannot fairly be taken in the light most favorable to petitioner. In any event, the factual issues of causation that were litigated below are not relevant to the FIFRA preemption questions that petitioner seeks to raise in this Court. This brief counter-statement is included only to provide some balance to petitioner's one-sided statement.

2. *See Ciba-Geigy, Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1125-26 (Fla. 4th Dist. Ct. App. 1997).

3. "R" refers to the record below; "PX" refers to the exhibits of plaintiff-petitioner; and "DFX" refers to the exhibits of defendant-respondent at the *Frye* hearing on the admissibility of expert testimony.

that the label rendered the Benlate misbranded or otherwise involved fraudulent or even negligent misrepresentations. Pet. App. 12a.[4]

At the conclusion of trial, the jury rejected petitioner's theories of failure to warn and failure to test. However, it returned a verdict for petitioner on the claim that respondent had negligently distributed Benlate in Ecuador.

As the Florida District Court of Appeal correctly understood, petitioner's negligent-distribution claim was bottomed on respondent's alleged negligence with respect to the warnings and instructions it provided to the users of Benlate in Ecuador. Indeed, in its opposition to respondent's motion for post-verdict relief (when only the negligent-distribution claim remained in the case), petitioner repeatedly characterized its case at trial as showing that respondent "breached its duty to warn of the danger involved in using Benlate in the Ecuadorian environment." R16 at 3013. *See also id. at, e.g.,* 3014-15 (respondent "gave no warning to the Ecuadorian government, banana farmers, shrimp farmers, or anyone else concerning the harmful effects of these products on pacific white shrimp"), *id.* at 3015 (respondent "gave no warnings to anyone concerning any of

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4. The EPA-approved label at issue in this case contained the following warning:

> [T]his product is toxic to fish. Do not contaminate lakes, rivers or ponds. Do not apply when weather conditions may cause spray to drift. Do not contaminate streams with the washing of spraying equipment or elimination of residues.

(R35 at 698-700; PX 4; DFX 56).

these products [sic] potential to harm shrimp"), *id.* (the negligent-distribution claim involved "the inadequacy of the warnings given by [respondent]").

In view of the nature of petitioner's theory of negligent distribution, respondent argued that this claim was preempted by the express preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. *See* 7 U.S.C. § 136v(b). The trial court rejected that argument, holding that the FIFRA preemption provision in Section 136v(b) does not apply to claims involving fungicides exported from the United States for u in foreign countries.

3. On appeal, the Florida District Court of Appeal reversed and held that petitioner's negligent-distribution claim was preempted by FIFRA. After analyzing the applicability of FIFRA to exported fungicides, the court concluded that such products "must . . . be labeled accurately and include certain information" prescribed by the statute and EPA regulations and that "Congress[] intend[ed] to regulate the 'labeling' of dangerous pesticides produced in the United States, but exported to foreign markets." Pet. App. 6a, 7a. Thus, petitioner's claim was preempted to the extent it relied on warnings or instructions derived from state law that add to or differ from the label approved by EPA under FIFRA. *Id.* at 8a.[5]

5. Although the court below stated that "under appropriate jurisdictional circumstances, a foreign plaintiff, relying on foreign law, could probably assert an inadequate warning or 'labeling' claim in a state court based on injury arising from the use of a United States-manufactured pesticide abroad" (Pet. App. 7a–8a), petitioner expressly elected to bring its suit in Florida courts under Florida law rather than Ecuadorian law, and it deliberately maintained that choice throughout the litigation.

In addition, the Florida District Court of Appeal found that petitioner's negligent-distribution claim under Florida law was "nothing more than a disguised labeling claim" (Pet. App. 9a) because it was, "at its heart, a claim challenging the product's label and the failure to warn" (*id.* at 11a). As the court explained, the negligent-distribution claim effectively constituted a labeling claim since petitioner argued not that there was a defect in the product but rather that the warnings and instructions provided by respondent for the use of Benlate on banana plants were not adequate to prevent harm to petitioner's shrimp. *Id.* at 9a.-12a. In these circumstances, "it is clear that, to avoid liability for [petitioner's] claimed negligence [in the distribution in Ecuador], the remedy is for [respondent] to specifically warn of run-off potential and toxicity to shrimp." *Id.* at 11a. Thus, this claim was preempted under the federal FIFRA statute.

REASONS FOR DENYING THE PETITION

This petition should be denied for several reasons. *First*, this Court lacks jurisdiction under 28 U.S.C. § 1257 to review the judgment of the Florida District Court of Appeal because petitioner failed to seek review in the Supreme Court of Florida. *Second*, despite petitioner's request that the petition be held pending decision in *Bates v. Dow Agrosciences LLC*, No. 03-388 (U.S. argued Jan. 10, 2005), petitioner waived any *Bates* issues below and in any event the cases present different FIFRA preemption questions. *Third*, the non-*Bates* question of FIFRA preemption with respect to fungicides exported for use abroad (a) is one of first impression that presents no conflict and (b) was correctly decided by the court below since such exported products must contain an EPA-approved warning label.

I. BECAUSE PETITIONER FAILED TO SEEK REVIEW IN THE SUPREME COURT OF FLORIDA, THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1257.

Petitioner seeks review of the judgment of the Florida District Court of Appeal. By its own acknowledgment, petitioner did not file for review in the Supreme Court of Florida before coming to this Court. Because petitioner did not seek review in the Florida Supreme Court, this Court lacks jurisdiction under 28 U.S.C. § 1257.

Section 1257(a) authorizes this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." This jurisdictional provision reflects the fundamental principle that "no decision of a state court should be brought here for review ... until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted." *Gorman v. Washington University*, 316 U.S. 98, 100 (1942).

The "highest court of a State in which a decision could be had" ordinarily is the supreme court of the state. This is the governing rule unless "state law makes [the] decision [of an intermediate state appellate court] final and non-reviewable" by the state supreme court. R. STERN, ET AL., SUPREME COURT PRACTICE § 3.13 at 166 (8th ed. 2002). Thus, "if there is discretionary review by a higher state court, the exercise of such discretion must be sought" in order for this Court to have jurisdiction pursuant to Section 1257. *Id.*

This general rule is controlling here because the Florida Supreme Court could have reviewed the decision of the Florida District Court of Appeal. As the Florida Supreme

Court itself has explained, Article V of the Florida Constitution grants it "in the broadest sense" jurisdiction "over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself." *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). In light of this broad authority, the Florida Supreme Court has expressly cautioned parties that its review must be sought before filing a petition for a writ of certiorari under Section 1257:

> To seek review of a state court judgment in the United States Supreme Court, a litigant first must exhaust all avenues of review available in the courts of the state. *The fact that review in the highest court is discretionary is irrelevant; the litigant still must seek such review in order to proceed to the United States Supreme Court.*

Id. at 289 (emphasis added). For purposes of Section 1257, it is entirely irrelevant that the Florida Supreme Court's jurisdiction was discretionary and that petitioner speculates that it was unlikely to exercise its discretion to grant review in this case. *Id.* at 288-89.

Petitioner suggests (Pet. 1) that the Florida Supreme Court had no jurisdiction to review the federal issues of FIFRA preemption that it seeks to raise here. That simply is incorrect. In fact, the Florida Supreme Court routinely decides cases involving questions of federal preemption. *See, e.g., State v. Otte*, 2004 WL 2251849 (Fla. Oct. 7, 2004) (preemption under federal wiretap law); *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842 (Fla. 2003) (ERISA preemption of state damages claim); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001) (issue of federal

preemption of state-law action against internet service provider); *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000) (preemption of state-law tort suit by Federal Cigarette Labeling and Advertising Act).

To be sure, the Florida Supreme Court's jurisdiction does not encompass review of a "district court decision rendered without opinion or citation" (which is commonly known as a per curiam affirmance decision or "PCA"). *Florida Star,* 530 So. 2d at 288 n.3. In that specified circumstance, review of a PCA may be sought directly in this Court without first seeking review in the Florida Supreme Court. *Id.* However, this narrow exception has no application here because the Florida District Court of Appeal did not render its decision without opinion or citation but rather issued a lengthy opinion in this case.

Finally, the cases cited by petitioner (Pet. 1-2 n.1) do not support a contrary conclusion. In *Bunkley v. State*, the court merely reiterated the settled rule that it has no jurisdiction over "an affirmance *without opinion* by a district court of Florida." 882 So. 2d 890, 892 n.2 (Fla. 2004) (emphasis added) (*citing Florida Star*, 530 So. 2d at 287). The concurring opinion of Justice Wells, upon which petitioner relies, simply observed that "[t]he district courts of appeals are, in most instances, courts of last resort." *Id.* at 908 (Wells, J., concurring). That statement is both true – because so many cases are decided by PCA without opinion, and also because the Florida Supreme Court often exercises its discretion to deny review even where it has jurisdiction – and irrelevant here – because this case does not involve a PCA without decision and the Florida Supreme Court was given no opportunity to decide whether to grant review in this case. What is more, Justice Wells recognized that under

Florida Star, the losing litigant in a case not involving a PCA – which is the situation here – must exhaust its state remedies by seeking review in the Florida Supreme Court before filing a petition for certiorari. *Id.* at 912. Nothing in *Bunkley* therefore justifies or excuses petitioner's failure to request review in the Florida Supreme Court.[6]

In the end, petitioner's position reduces to the untenable proposition that the Florida Supreme Court has no jurisdiction to review the written decisions of the Florida District Courts of Appeal. That is not and could not be the law of Florida.

Accordingly, because petitioner did not exhaust its avenues of review under Florida law by invoking the available jurisdiction of the Florida Supreme Court, this Court is without jurisdiction to entertain the petition under 28 U.S.C. § 1257.

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6. For the same reasons, the Florida Supreme Court's indistinguishable statement in *Martin v. State* that "the district courts now constitute the courts of last resort for the vast majority of litigants" also has no bearing here. 747 So. 2d 386, 390 (Fla. 2000). So, too, no illumination is shed in the present case by the virtually identical statement in the committee notes to the 1993 amendments to the Florida Rules of Appellate Procedure that "[t]he district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended Article V." *In re Amendments to the Florida Rules of Appellate Procedure*, 609 So. 2d 516, 526 (Fla. 1992). On the contrary, the committee notes explicitly admonish that the amended "rule is not intended to affect the substantive law governing the jurisdiction of any court." *Id.*

II. THE PETITION SHOULD NOT BE HELD PENDING DECISION IN *BATES*.

Contrary to petitioner's contention, there is no need for the Court to hold the petition pending its decision in *Bates*. To begin with, petitioner failed to raise, and indeed affirmatively waived, any *Bates* issues. In addition, *Bates* is fundamentally distinguishable from this case.

At bottom, petitioner's argument rests on nothing more than the fact that both cases involve FIFRA preemption issues. Petitioner ignores, however, that the cases and the issues are otherwise entirely different. The Court should reject petitioner's effort to switch its litigation strategy at this late stage in order to take advantage of the recent grant of review in *Bates*.

A. Petitioner Failed to Raise Any *Bates* Issues Below And Affirmatively Waived These Arguments.

"It is essential to the jurisdiction of the Supreme Court under § 1257(a) that a substantial federal question has been properly raised in the state court proceedings." SUPREME COURT PRACTICE § 3.16 at 168. "Thus, it has become the settled practice of the Supreme Court that, in the exercise of its § 1257(a) appellate jurisdiction over state courts, it will not consider federal questions not pressed or passed upon in the state courts." *Id.* at 171. Because petitioner failed to present any of the *Bates* issues that it now seeks to take advantage of, those issues were waived and provide no basis for the Court to hold this petition pending decision in *Bates*.

Nowhere in the proceedings below did petitioner assert any of the arguments that are before the Court in *Bates*.

In response to respondent's submission that petitioner's claims for damages were preempted by FIFRA, petitioner did not argue, for example, that FIFRA preemption extends only to state statutes and regulations but is entirely inapplicable to state common-law tort suits for damages. Nor did petitioner argue that FIFRA preemption is inapplicable because EPA does not require efficacy data to be submitted at the time the label is approved.[7] Nor did it urge that the label rendered the Benlate misbranded or contained fraudulent or even negligent misrepresentations, or that respondent had acted in any way that was inconsistent with the label, or that Florida law merely provided an additional remedy for conduct that constituted a violation of federal law under FIFRA. Thus, petitioner failed to preserve those issues in the lower court.

In fact, petitioner affirmatively waived these issues below. As petitioner acknowledges in this Court (Pet. 5), its sole focus was on FIFRA preemption in the context of *products exported for use in a foreign country.* That is the central issue in this case, and it is the issue that petitioner litigated on the merits in the Florida District Court of Appeal. By contrast, *Bates* arose from the use of a herbicide in the United States. Petitioner's counsel waived any *Bates* issues by candidly acknowledging at oral argument below[8] that

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7. As explained in more detail below, such an argument does not in any event aid petitioner because this case, in contrast to *Bates*, does not involve efficacy-type claims. *See* pages 13-14, *infra*.

8. The Florida District Court of Appeal provided a disc of the oral argument. The quotations in text are taken from that recording. At the Court's request, we will lodge with the Clerk of this Court the original disc provided by the Florida District Court of Appeal.

petitioner would have no claim if this case involved (as *Bates* does) the domestic use of Benlate rather than its export for use abroad:

> If this were dealing with domestic use of the product, [DuPont's counsel] would be absolutely right [that there would be FIFRA preemption]. . . . I know that [DuPont's counsel] would say that it is anomalous that a domestic plaintiff could not bring the lawsuit but a foreign plaintiff could.

See also id. (distinguishing a prior case on the ground that "it is a domestic use case"); *Florida Court Overturns $12 Million Award to Ecuadorian Shrimp Farm in Benlate Case*, 19 BNA TOXICS LAW RPTR. 358 (Apr. 15, 2004) (statement of petitioner's counsel: "Our position is that FIFRA doesn't apply [when the product is used in a foreign country]. We agree that a domestic use of a product is preempted, but not foreign use of a product").[9]

Likewise, petitioner waived any *Bates* issues by accepting below the legal principle that FIFRA preemption applies to tort claims for damages under state common-law. As petitioner acknowledges in this Court, the Florida District Court of Appeal observed that "'*it is not disputed*'" by petitioner "that the statutory [preemption] language has

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9. In another aspect of its argument, petitioner did contend that this is not a labeling case at all and therefore its claims are not preempted. We address that argument *infra* (pages 15-17). For present purposes, the central and sufficient point is that petitioner, having conceded that a domestic-use claim would be preempted, cannot benefit from the resolution of the issues that relate to the domestic-use claims in *Bates* and that petitioner elected to relinquish rather than litigate below.

been interpreted to prohibit a common law cause of action resting on an alleged failure to warn or labeling deficiencies." Pet. 5-6 (emphasis added).

Thus, petitioner not only failed to preserve any *Bates* issues in the Florida District Court of Appeal but in fact expressly waived them by conceding that its claims would be preempted by FIFRA if this case involved domestic rather than foreign use and that common-law tort actions for damages under state law are subject to preemption. Having litigated its case below on this basis, petitioner cannot now be heard to assert any *Bates* issues in an eleventh-hour attempt to piggyback on this Court's intervening grant of certiorari in *Bates*.

B. This Case Is Distinguishable From *Bates*.

Even apart from waiver, this petition need not be held pending the Court's decision in *Bates*. Indeed, the Florida District Court of Appeal rejected petitioner's post-decision request that it hold the case in abeyance pending *Bates*. Pet. App. 14a. In arguing otherwise, petitioner fundamentally misconceives the nature of and distinctions between the two cases.

1. To begin with, *Bates* is what is called an "efficacy" case. That is, *Bates* involves the efficacy of a product in terms of its effect on the crops to which it is applied and its effectiveness in remediating the problem for which it is used. For example, the *Bates* plaintiffs used a herbicide to prevent weeds in their peanut crops and now allege that the product harmed those crops.

The present case, by contrast, is entirely different. It involves a claim not that banana plants were hurt by the application of Benlate to them, but rather that petitioner's shrimp were damaged after Benlate was applied to the banana plants and ran off into nearby waterways. In other words, this case, unlike *Bates*, does not concern the efficacy of a product with respect to the purpose for which it was used. Nor is there an allegation here that the product did not do what it was sold and used to do, or that it was defectively designed or improperly manufactured. Instead, this case pertains to respondent's purported failure appropriately to warn users of the alleged environmental effects of Benlate extending beyond the banana farms where the product was utilized to control a fungus. While such a claim is, we submit, preempted by FIFRA, the simple point here is that it is a fundamentally different claim from the one in *Bates*.

Moreover, in the context of *Bates*, a principal legal issue before the Court is whether FIFRA preemption does not extend to claims relating to product efficacy because EPA no longer requires efficacy data to be submitted at the time it approves the label for the product. Indeed, as the Solicitor General demonstrated in its amicus briefs at the petition stage and on the merits in *Bates*, the only conceivable conflict in the cases addressing FIFRA preemption involves the issue whether the FIFRA provision authorizing EPA to waive the submission of efficacy data (7 U.S.C. § 136a(c)(5)) creates an exception to the express preemption provision (7 U.S.C. § 136v(b)) for agriculture crop damage claims involving a pesticide's efficacy.[10] By contrast, that efficacy issue is not implicated in the present case.

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10. *Compare Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, No. 03-388 (U.S. argued Jan. 10, 2005), (Cont'd)

Finally, as previously noted, *Bates* is a domestic-use case while the present case involves the use abroad of an exported product. Petitioner itself concedes, as it must, that "the fact that this case involves an exported pesticide and a claim arising in a foreign country distinguishes the issue presented here from that in *Bates*." Pet. 10. Similarly, petitioner admits that a negligent-distribution claim, which is at the center of this case, is not presented in *Bates*. *Id.* at 7. And, once again in contrast to *Bates*, there is no allegation here that respondent's use of the EPA-approved label rendered its Benlate misbranded or violated FIFRA in any respect, or that the label contained fraudulent or even negligent misrepresentations.

2. Nonetheless, petitioner asserts that *Bates* will provide guidance on the correctness of the Florida District Court of Appeal's ruling that petitioner's claim of negligent distribution essentially involves a challenge to the adequacy of the label. However, petitioner critically misunderstands the decision below in this case and the demarcation between issues of state and federal law for purposes of FIFRA preemption.

The gravamen of petitioner's argument is that its negligent-distribution claim does not involve a challenge to the adequacy of the warnings and instructions on the Benlate label. Significantly, petitioner brought its claim under the law of Florida, and it chose how to plead and prove its claim under state law. Fundamentally, the nature and elements of

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(Cont'd)

and *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366 (Cal. 2000), *with American Cyanamid Co. v. Geye*, 79 S.W. 3d 21 (Tex. 2002), *cert. denied*, 123 S. Ct. 2637 (2003).

the negligent-distribution cause of action are a matter – and solely a matter – of state law. Based on the claim asserted and the record developed by petitioner in this case, the Florida District Court of Appeal, in a thorough and well-reasoned written opinion, held that under Florida law petitioner's negligent-distribution claim "is truly nothing more than a disguised labeling claim." Pet. App. 9a. Focusing on petitioner's allegation that respondent "had been negligent in its distribution of Benlate" because it failed to warn of potential harms or inadequately instructed on proper use (*id.* at 3a–4a), the court explained that this claim necessarily involved a challenge to the adequacy of the warnings and instructions provided on the Benlate label:

> [I]t is clear that, to avoid liability for Aquamar's claimed negligence, *the remedy is for DuPont to specifically warn of run-off potential and toxicity to shrimp.* Consequently, we find that *Aquamar's negligent distribution claim is, at its heart, a claim challenging the product's label and the failure to warn.*

Id. at 11a (emphasis added). Furthermore, this analysis accords with a long line of decisions holding that the determinative issue, in applying FIFRA's preemption provision, is not whether the state-law claim is explicitly "'*couched*'" as a challenge to the product label but whether it "'*boils down* to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered.'" *Id.* at 9a (emphasis added) (citation omitted).

Of course, whether the state-law cause of action, as construed by the state court, is preempted by FIFRA ultimately presents a federal question. However, the

preemption analysis is a two-step process: *first*, to determine, as a matter of state law, the nature and elements of the claim in question; and *second*, to determine, as a matter of federal law, whether that claim constitutes a labeling requirement "in addition to or different from" (7 U.S.C. § 136v(b)) the EPA-approved label. The crux of petitioner's present argument in this respect is that the Florida District Court of Appeal erred in holding that the negligent-distribution cause of action entailed a labeling claim at all, not that such a labeling claim is outside the scope of FIFRA preemption.

Accordingly, we submit that the Florida District Court of Appeal correctly decided the nature and elements of petitioner's state-law negligent-distribution claim. But more importantly for present purposes, that ruling is a question of Florida law that is not appropriately revisited by this Court under 28 U.S.C. § 1257 (and that petitioner chose not to present to the Florida Supreme Court). Because such a ruling on a state-law issue is not a ground for certiorari, and because the decision in *Bates* will not affect that ruling, this petition need not be held pending the Court's decision in *Bates* but instead should be denied.

III. THE NON-*BATES* FIFRA EXPORT PREEMPTION ISSUE DOES NOT WARRANT THIS COURT'S REVIEW.

Finally, petitioner contends that, wholly apart from *Bates*, this Court should grant review to address the issue of FIFRA preemption in the context of fungicides exported for use in a foreign country. However, the Florida District Court of Appeal's decision is a ruling of first impression and there is no conflict on the issue. Furthermore, the decision below is correct. Accordingly, the petition should be denied.

A. The Decision Below Involves An Issue Of First Impression And Does Not Present A Conflict.

The petition conspicuously makes no claim of a conflict on the FIFRA export preemption issue. Nor does it cite any other cases that have decided the issue.

In fact, to the best of our knowledge, this is the first case to decide the FIFRA export preemption issue. Petitioner concedes that the parties cited no such decisions below (Pet. 6) and that even now "[n]o court – except the court below – has held that FIFRA preempts a suit in state court on negligent distribution of a pesticide or fungicide in a foreign country" (*id.* at 10). Indeed, petitioner's counsel acknowledged at the time of the Florida District Court of Appeal's decision that "the ruling is the *first time* that a court has found that FIFRA preempts a pesticide exported to a foreign country." 19 BNA TOXICS LAW RPTR. at 358 (emphasis added).[11]

Under this Court's settled standard, there is no basis to grant review on this question of statutory construction that is an issue of first impression in the lower courts and that does not involve a conflict in decisions.

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11. *See also Palmas Y Bambu, S.A. v. DuPont*, 881 So. 2d 565, 577-79 (Fla. 3d Dist. Ct. App. 2004) (following decision below on FIFRA export preemption). In addition, in a case involving exposure in a foreign country, the court recognized that defendants "can make a strong argument that [p]laintiff's failure to warn claims are preempted by FIFRA's express preemption provision." *Rodriguez v. Shell Oil Co.*, 818 F. Supp. 1013, 1015 (S.D. Tex. 1993), *subsequent appeal, Delgado v. Shell Oil Co.*, 231 F.3d 165, 169-70 (5th Cir. 2000). Although this opinion did not squarely resolve the FIFRA export preemption issue, the court's assessment is fully consistent with the decision of the Florida District Court of Appeal in this case.

B. The Decision Below Is Correct And Does Not Call For Further Review.

The decision below on the FIFRA export preemption issue is correct and does not call for this Court's review. The Florida District Court of Appeal carefully summarized the regulatory scheme applicable to fungicides exported for use in foreign countries. *See* Pet. App. 4a–7a. Under that system, it is clear, as the court below recognized, that exported pesticides "must . . . be labeled accurately and include certain information" and are deemed to be "misbranded" if the label fails to contain necessary warnings or instructions. *Id.* at 6a–7a. These provisions "adequately demonstrate Congress's intent to regulate the 'labeling' of dangerous pesticides produced in the United States, but exported to foreign markets" (*id.* at 7a), and therefore FIFRA's express preemption provision prohibiting any state-law "requirements for labeling or packaging in addition to or different from those required under this subchapter" (7 U.S.C. § 136v(b)) readily applies to exported products.

FIFRA is a comprehensive federal statute that regulates the use, sale, and labeling of pesticides. *See* 7 U.S.C. §§ 136-136y. Before a pesticide may be sold in the United States, it must be registered and its labeling approved by EPA. *See* § 136a(a), 136a(c)(5)(B). The EPA cannot register a pesticide or approve its label unless it finds that the product does not pose any "unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of [its] use." § 136(bb); *see also* § 136a(c)(5)(C). Under this standard, Benlate had been registered with the EPA for more than 30 years (R38 at 1272; R45 at 2567-68; R46 at 2637).

FIFRA also applies to pesticides exported for use in a foreign country. *See* §§ 136a(a), 136o; *In re Shield-Brite Corp.*, Dkt. No. FIFRA-90-H-02, 1992 WL 437254 (E.P.A. Dec. 31, 1992) (imposing a civil penalty on a manufacturer for violating the FIFRA requirement that it provide a multilingual label on an exported pesticide). Even a pesticide intended solely for export must comply with the labeling requirements in Section 136o. EPA "interprets" Section 136o to "provide authority for EPA to establish the specific requirements for labeling of exported pesticides." *Pesticide Export Policy*, 58 Fed. Reg. 9062, 9063 (E.P.A. Feb. 18, 1993). Moreover, EPA's regulations expressly state that FIFRA applies to pesticides exported to foreign countries: "Every exported pesticide ... must bear a label .. . which meets the requirements of FIFRA section [136o]." 40 C.F.R. § 168.65(a).

Against this background, it is evident that FIFRA provides for EPA-approved labels for exported fungicides. Congress plainly intended that the adequacy of such labels would be determined by EPA as the expert regulatory agency, not by lay jurors or judges in state tort actions. As the court below explained:

> [Respondent] was obligated to comply with a host of labeling and administrative requirements imposed by FIFRA relating to the safety of the product and the adequacy of any necessary warnings. Thus, the question of whether the product's label contained adequate and necessary warnings was a matter for administrative determination within the context of federal regulations, not Florida common law.

Pet. App. 8a. Furthermore, such centralized responsibility is necessary to promote the objective of FIFRA's express preemption provision: uniformity in product labeling. Because the plain and broad language of the FIFRA express preemption provision does not provide an exception for exported products, and because preemption of state-law labeling claims furthers the purpose of the preemption provision and the overall regulatory scheme, the court below correctly rejected petitioner's argument that FIFRA preemption does not apply to exported products.[12]

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12. Petitioner 's citation to EPA's *Pesticide Export Policy* (Pet. 9-10) does not support a contrary conclusion. That passage deals with the issue whether EPA should *ban* the export of pesticides that are *unregistered* in the United States; it has no application to registered products that are permitted to be exported such as Benlate.

Likewise, petitioner's emphasis on the language in Section 136v(a) that a state may regulate the sale or use of a federally registered pesticide "in the State" does not imply that the separate preemption provision in Section 136v(b) is confined to the labeling of pesticides used domestically and does not encompass exported products. The language "in the State" nowhere appears in Section 136v(b) but only in Section 136v(a). Furthermore, it is appropriate in Section 136v(a) to frame a state's regulatory authority in terms of sale or use "in the State"; a state could not properly regulate the sale or use in other states (or other countries). By contrast, a limitation on preemption to pesticides sold or used "in the State[s]" – a limitation that is entirely absent from the statutory text of Section 136v(b) – would be contrary to the uniformity purpose of the preemption provision and EPA's expert and centralized administrative responsibility. Thus, whatever relation these two provisions may have in other contexts, the "in the State" language in Section 136v(a) cannot be taken to limit the textually unrestricted preemption directive in Section 136v(b) to domestic-use cases and to exclude categorically from the scope of preemption all products containing an EPA-approved label that are exported from the United States for use in a foreign country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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